

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2717 OF 2006

Ashok Madhav Phadnis & Anr. ...Appellants

Vs.

Walchand Nagar Co-op. Bank Ltd. ...Respondents

Mr.Uday Warunjikar, Advocate for Appellants

Mr.U.R.Mate, Advocate for Respondents

CORAM: SHRI D.G. DESHPANDE &
SMT. ROSHAN DALVI, JJ.

DATE : 4TH DECEMBER, 2006.

P.C.

1. Heard Advocate for the Appellant and Respondent.
Rule. Rule made returnable forth with.

2. We heard both the Advocates. The Appellant has challenged the judgment and decree dated 31st August, 2005 passed by Civil Judge, Senior Division, Baramati in Special Summary Suit No.3 of 2000.

3. The main contention of the Appellant is that on 24th July, 2001 he had filed an application for leave to defend under Order 37 Rule 5 of the C.P.C. and following orders have been passed on that application:

. " Both party and their Advocate absent when called on, on 9.10.2001. Court heard argument of Plaintiff side and as per oral request of Defendant's Advocate matter adjourned but till today Advocate for Defendant not argued.

. Therefore Advocate for the Defendant is

hereby directed to argue on next date failing which necessary order will be passed.

Sd/-
Civil Judge S.D. Baramati
Dated: 28.1.2003

. Advocate for the Defendant failed to comply above said order dated 28.1.2003. Hence, it be fixed for further order.

Sd/-
Civil Judge S.D., Baramati
Dated: 21.3.2003.

. Application is granted.

Sd/-
Civil Judge S.D., Baramati
Dated: 10.6.2003."

4. It is from the aforesaid orders that neither the prayer made by the Appellant to grant him leave to defend is granted, nor is it rejected. These orders cannot be interpreted as orders granting leave either conditional or unconditional and therefore, the contention of the Counsel for the Appellant has to be accepted that the consequent decree is liable to be set aside.

5. The learned Counsel for the Respondent initially tried to contend that the decree came to be passed after hearing both the sides because the written statement was not filed. However, perusal of the impugned judgment shows that the suit was kept for hearing, no evidence was recorded thereafter.

6. In such a situation if the Appeal is admitted we will have to grant stay that will result in prolonging the

original litigation. When we explained them this aspect, the learned Counsel for the Respondent contended that the Court may in that case pass appropriate order.

7. We therefore, set aside the impugned judgment and decree and remand the matter to the trial Court to decide the application of the Appellant for leave to defend the application dated 24th July, 2001 on its own merits.

8. The parties to appear before the Civil Judge S.D. Baramati on 18th December, 2006 at 11.00 a.m. with the copy of this order and the Court shall decide the application under Order 37 Rule 5 of Code of Civil Procedure within four weeks therefrom.

9. Both the parties to give co-operation to the Court in that regard.

10. The Appeal is disposed of accordingly. R & P be sent back to the lower Court immediately.

(SMT. ROSHAN DALVI, J.) (SHRI D.G. DESHPANDE, J.)